

The European Parliament Sidelined

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When the Council adopted the first set of [procedural rules governing Article 7\(1\) TEU hearings](#) in July 2019, it unilaterally decided to make the Commission the proxy for the Parliament. This post will show how the Council's differential treatment of the Commission and the Parliament as [activating bodies under Article 7\(1\)](#) is not compatible with EU primary law and goes against in particular the principle of institutional balance.

The Council has justified the formal exclusion of the Parliament by hiding behind a confidential *unwritten* legal opinion of the Council Legal Service (CLS hereinafter) which, not for the first time (see [here](#) and [here](#) for a critical assessment of the CLS opinions regarding the Commission's 'pre-Article 7 proposal' and the Commission's rule of law budgetary mechanism respectively), one may find difficult to comprehend.

1. The mysterious legal opinion of the Council Legal Service

There are at least four problems with the opinion of the CLS regarding the (lack of) involvement of the Parliament in the Council's formal hearings in the case of the ongoing Article 7(1) procedure initiated by the Parliament itself against Hungary in September 2018.

First, the Austrian Presidency, during which the CLS opinion was given, never made clear that the opinion was delivered, let alone orally (to our knowledge, the first mention of the existence of the CLS opinion was made by [Eszter Zalan](#)). The lack of a written opinion may be found extremely peculiar for a crucial procedural question involving an untested provision of EU primary law on what is furthermore an issue of the most fundamental importance.

Secondly, the CLS opinion has seemingly claimed that any formal involvement of the Parliament would breach EU primary law according to a non-public document (European Parliament, GRI Meeting of 26 October 2018, SI(2018) 579) obtained by one of the present authors:

[The CLS] expressed its strong reservations on any European Parliament involvement that would go beyond the mere triggering of the procedure and the granting of consent as provided in Article 7(1) TEU. It considered that formal involvement in the work of the Council through participation in meetings would violate the institutional balance, and that the only acceptable interaction would be the provision of information by the European Parliament.

This position however deviates from the basic premises of procedural equality between the institutions, a principle important enough, in the eyes of the Court, to be reaffirmed even where the Treaties do not expressly allow for such equality, as the Parliament itself experienced, acting as a respondent, in the case of [Les Verts](#).

Thirdly, in addition to Hungary of course, only two – you read that correctly – national governments (Latvia and the UK) expressed their full agreement with the CLS opinion according to the same non-public document quoted above:

The ensuing discussion revealed divergent views in this respect: LV, UK and HU fully supported the Council Legal Service opinion. EL, NL, DE, ES, BE, DK rather suggested to find a way to involve the European Parliament. EL welcomed input from the Commission, but cautioned against inviting the Commission to provide input to Council discussions in place of a direct contribution from the European Parliament. SE and FR expressed in particular their concerns about the developments in Hungary. Hungary said that it is fully committed to EU values and that it supports the Council Legal Service opinion as regards the European Parliament's involvement.

Fourth, to this day, the Council is yet to give a publicly available digest of the main legal arguments on the basis of which the CLS claimed that the EU Treaties would (allegedly) preclude the Parliament from being able to formally present and defend its Reasoned Proposal within the framework of Article 7(1) hearing(s).

The irony is that the only legal argument to be mentioned in the document quoted above – an alleged violation of institutional balance – is seemingly used to justify the non-involvement of the Parliament when it is this non-involvement which, in our opinion, actually breaches of the principle of institutional balance. This is possibly the birth of a new method of legal interpretation of EU law which one may tentatively label the “Trumpian method”.

2. Violating institutional balance in the name of respecting institutional balance

By way of background, it is important to recall that at the time of the [first hearing of Poland under Article 7\(1\) TEU](#), the Council agreed to invite the Commission to submit a written contribution in which it offered an update on the state of play regarding the rule of law situation in Poland. In addition, the Commission was invited to present an oral update at the hearing itself. This involvement of the Commission before and during Article 7(1) hearings is entirely proper and the Council on this front acted in a constructive way with the view of maximising effectiveness of Article 7(1) procedure.

By contrast, the Council, in the situation where the Parliament is the Article 7(1) activating body, has decided to make its own Presidency and the Commission the proxies for the Parliament against, one must stress, the Commission's own position and with no indication in the text of Article 7(1) TEU to this effect.

The Council's position, codified in a document adopted in July 2019 called "[Standard modalities for hearings referred to in Article 7\(1\) TEU](#)", means that only the Parliament is treated differently and less favourably than the Commission but also the Member States (when at least one third of them have decided to activate Art. 7(1) TEU).

In addition to being absurd – the Commission in the case of Hungary is being asked to represent the views of another institution [when the Commission itself has repeatedly refused to activate Article 7\(1\)](#) – the Council's position is also legally flawed.

As previously noted, and to begin with, Article 7(1) TEU does *not* provide for any differences in procedural rights between the actors empowered to activate this procedure. This position is furthermore at odds with the very principle of institutional balance the CLS has apparently used to convince the Council to refuse the Parliament any formal involvement within the framework of Article 7(1) hearings. In the case of [Chernobyl](#), the Court of Justice stressed that 'observance of the institutional balance means that each of the institutions must exercise its powers with due regard for the powers of the other institutions'. In other words, institutional balance means mutual respect between institutions as regards their respective remits and attributions.

By preventing the Parliament to present and defend its Article 7(1) proposal or subsequently present an update on the issues to be covered by any ensuing hearing, it could be argued that the Council is exercising its powers with respect to the organisation of Article 7(1) hearings without due regard for the power of the European Parliament, since the power to activate Article 7(1) would be deprived of any *effet utile* if the Parliament cannot explain its position and reply to the arguments of the Hungarian Government. It may be worth recalling in this respect that the Court's case law has been historically extremely and rightly protective of the prerogatives and the role of the Parliament. For example, in the [Isoglucose cases](#), the Court found that the consultation of the Parliament, when required by the Treaties, represents 'an essential factor in the institutional balance intended by the treaty'. While the Article 7(1) procedure cannot be confused with a legislative procedure, it is difficult to see how institutional balance could be used to treat less favourably the Parliament than the other actors which are empowered to trigger Article 7(1).

Lastly, the exclusion of the European Parliament is also unquestionably problematic as regards the principle of mutual sincere cooperation. Mutual sincere cooperation is the inter-institutional extension of the originally vertical (i.e. between the EU and the Member States) principle of sincere cooperation. The Lisbon treaty has confirmed this horizontal extension in Article 13(2) TEU ('The institutions shall practice mutual sincere cooperation'). According to the case law of the Court of Justice, mutual sincere cooperation must apply even in the silence of the treaties and in all actions of the institutions. For example, the Court held that even when the Commission is entitled to withdraw a proposal, it may do so '[only after having due regard, in the spirit of sincere cooperation which ... must govern relations between EU institutions in the context of the ordinary legislative procedure, to the concerns of the Parliament](#)

[and the Council underlying their intention to amend that proposal](#)'. In the field of external relations, the Court has also [established](#) that, even though the Commission is allowed to submit legal observations to an international court on behalf of the EU without prior approval of the Council, the principle of mutual sincere cooperation requires the Commission to consult the Council beforehand if it intends to express positions on behalf of the EU before an international court. It seems therefore reasonable to assume *a fortiori* that the same principle of mutual sincere cooperation compels the Council not to treat differently and less favourably the Parliament when it comes to the presentation of its Reasoned Proposal at the first Article 7(1) hearing and the provision of updates at any subsequent hearings.

This is why the Commission must be commended for [repeatedly pointing out](#) that the Council should review its position and give the Parliament '[the possibility to present its case in procedures it has initiated](#)' so as to respect the principle of institutional balance. As the Commission emphasised at the time of the first hearing of Hungary, the Council must '[ensure a fair handling](#)' of the reasoned proposal tabled by Parliament. The Parliament is therefore right to demand its formal involvement at Article 7(1) hearings, and the Council is wrong to claim that it is sufficient for the Chair of the European Parliament's Civil Liberties, Justice, and Home Affairs (LIBE) Committee and the MEP-appointed rapporteur to meet with representatives of the Member State holding the rotating presidency of the Council (see [letter](#) from the President of the Parliament to the President of the Council dated 17 September 2019).

3. Conclusion

It would be deleterious not to say an irresponsible distraction to see a *Parliament v. Council* case arising out of the Council's indefensible position as highlighted in this post. In the light of the arguments above, the outcome of the case is a foregone conclusion which is bound to confirm that the Parliament is right to demand full and equal treatment with other Article 7(1) activating actors. The Council ought therefore to urgently revise its 'standard modalities for hearings' with respect to the Parliament. As suggested by the Commission itself, the Commission cannot '[be a proxy for the Parliament](#)'. Last but not least, the Council must commit to systematically publishing any legal opinion produced by the CLS in relation to Article 7 proceedings. The shame of an EU Member State falling far short of its obligations to uphold the values of democracy and the rule of law cannot be allowed to [inculcate a culture of opaque procedures, hidden opinions and secrecy](#) among EU institutions. Where Parliament had stood to defend these values, it should not be forced to sit outside.

